

D.T.E. 00-49

Appeal of Manager of the City of Cambridge of the Cable Television Division's Order on Motions For Summary Decision/Consolidation, pursuant to G.L. c. 166A, § 2.

D.T.E. 00-50

Appeal of MediaOne of Massachusetts, Inc., MediaOne Group, Inc., and AT&T Corp. of the Cable Television Division's Order on Motions For Summary Decision/Consolidation, pursuant to G.L. c. 166A, § 2 (Cambridge).

INTERLOCUTORY ORDER ON CITY OF CAMBRIDGE'S APPEAL AND
MEDIAONE'S APPEAL OF CABLE TELEVISION DIVISION'S ORDER ON
MOTION FOR SUMMARY DECISION/CONSOLIDATION

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Petitioner

I. INTRODUCTION

This Order addresses two appeals of the Cable Television Division's ("Cable Division") Order on Motions for Summary Decision/Consolidation, filed pursuant to G.L. c. 166A, § 2, with the Commissioners of the Department of Telecommunications and Energy ("Department"). The City of Cambridge ("Cambridge" or "City") appeals the Cable Division's ruling that consideration of the open access issue⁽¹⁾ during the license transfer process⁽²⁾ is inappropriate as a matter of law ("Cambridge Appeal") (MediaOne and AT&T v. Cambridge, CTV-99-4, at 32, 34 (2000) ("Cable Division Order")). MediaOne of Massachusetts, Inc., MediaOne Group, Inc. ("MediaOne") and AT&T Corp. ("AT&T") (together the "Companies") appeals the Cable Division's decision on management experience and license compliance issues ("MediaOne Appeal").⁽³⁾ On May 22, 2000, MediaOne of Massachusetts, MediaOne Group, Inc., and AT&T filed their opposition to Cambridge's appeal ("Opposition"). For administrative efficiency, the appeal of Cambridge and the appeal of the Companies will be consolidated and addressed in this Order. The Commission discusses the appeals in turn below.

II. PROCEDURAL HISTORY

On July 13, 1999, pursuant to G.L. c. 166A, § 7 and 207 C.M.R. § 4.00 et seq., MediaOne and AT&T submitted applications for approval of a change of control of cable television licenses from MediaOne to AT&T to 175 cities and towns in Massachusetts, including Cambridge. Cambridge held a public hearing on August 19, 1999.

On November 10, 1999, Cambridge denied the proposed license transfer, stating that (1) AT&T is not likely to adhere to the terms and conditions of the Final License, (2) AT&T itself does not have the cable television management experience to assume control of the Cambridge cable system, (3) AT&T has refused to provide nondiscriminatory access to its cable modem platform in Cambridge for unaffiliated

providers of Internet and on-line services, and (4) the issuing authority did not find that the transfer is in the public interest because AT&T refused to provide unaffiliated Internet Service Providers ("ISPs") nondiscriminatory access to its cable modem platform and also failed to make a case that the transfer would benefit Cambridge television subscribers (Cable Division Order at 2, citing City Manager Decision Regarding the Cable Television Transfer Request).

Pursuant to G.L. c. 166A, § 14, the Companies filed an appeal from the denial by Cambridge.⁽⁴⁾ With the appeal, the Companies filed a motion for summary decision with supporting memoranda pursuant to 801 C.M.R. § 1.01 (7)(h). The matter was docketed as CTV 99-4. On December 13, 1999, Cambridge filed answers. The City also filed an Opposition to the Motion for Summary Decision.

On May 1, 2000, the Cable Division issued its Order partially granting MediaOne's and AT&T's motions for summary decision. The Cable Division ruled that withholding consent on the grounds that the transfer applicant did not provide open access to its cable modem platform was inappropriate as a matter of law (Cable Division Order at 32, 34). The Cable Division determined that the case raises questions of fact concerning AT&T's managerial ability to assume the license, and, thus, denied the motion for summary decision in part. The Cable Division ruled that evidentiary hearings were necessary to resolve the management issues (id. at 38).

III. SUMMARY OF THE CABLE DIVISION'S ORDER

In its Order, the Cable Division considered the appeal and motion under its license transfer standard of review, which provides:

(1) In reviewing an application for a transfer or assignment of a license or control thereof, an issuing authority shall consider only the transferee's

(a) management experience,

(b) technical expertise,

(c) financial capability, and

(d) legal ability to operate a cable system under the existing license.

(2) As part of an issuing authority's review of an application for a transfer or assignment of a license or control thereof, an issuing authority shall not propose amendments to or renegotiate the terms of the existing license or any license renewal proposal

(Cable Division Order at 4-5, citing 207 C.M.R. § 4.04). The Cable Division ruled that the cable licenses at issue did not contain any provision requiring the licensee to provide open access, and that the appellees' attempts to impose such obligations on the transfer applicant violated 207 C.M.R. § 4.04(2) (id. at 32). Further, the Cable Division found that Cambridge's determination that AT&T's unwillingness to provide open access resulted in AT&T's failure to satisfy the legal and technical prongs of § 4.04(1) was unreasonable given that an open access requirement would constitute an amendment to the Cambridge license and thus exceeded the limits of § 4.04(2) (id. at 34-35). Accordingly, the Cable Division ruled that AT&T's ability to provide open access was not relevant to appellees' review of the application to transfer the existing licenses (id. at 34). Therefore, the Cable Division found that there was no material question of fact with respect to the open access issue and granted summary decision for the Companies with respect to this issue as raised in the Cambridge matter (id.).

Further, the Cable Division found that Cambridge's allegation that it did not receive adequate assurances that AT&T possesses managerial experience could not be resolved by summary decision (id. at 37). In addition, the Cable Division determined that the record was insufficient to determine as a matter of law whether AT&T is likely to adhere to the terms and conditions of the existing license and further that this question may be relevant to the transfer review process (id. at 38). Accordingly, the Cable Division denied the Companies' motion for summary decision on those grounds (id.).

IV. CAMBRIDGE'S APPEAL

A. Summary of Cambridge's Appeal

Cambridge argues that the Cable Division exceeded its authority when it applied the transfer regulations to preclude consideration of the open access issue (Cambridge Appeal at 14). Cambridge asserts that, in making such a determination, the Cable Division impermissibly narrowed Cambridge's municipal rights in a manner contrary to federal law, and exceeded its statutory authority under G.L. c. 166A (id. at 17-18).

Cambridge argues that "Congress explicitly gave the states or franchising authorities the power, and thus the responsibility, to make license control decisions in a manner intended to promote or maintain competition" (id. at 15, citing AT&T Corp et al v. City of Portland et al., 43 F.Supp. 2d at 1152). According to Cambridge, Congress' intent to empower the franchising authority as the primary means of preserving competition and protecting the public interest is further evidenced by 47 U.S.C. § 552(c), which states, in part, "[n]othing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not inconsistent with this subchapter" (id. at 16).

Cambridge argues that this language expressly preserves to it, as the franchising authority, the power to investigate the open access issue (id. at 17). Cambridge appeals the Cable Division's conclusion that the agency, and not the municipality, is the

"franchising authority," and asserts that this is a question the Department must answer in its decision of Cambridge's Appeal (id. at 17).

Cambridge further argues that the Massachusetts Legislature expressly granted all authority to approve transfer to the local authorities, such as Cambridge, subject only to the limitation that consent to a transfer decision not be arbitrarily or unreasonably withheld (id.). By concluding that 207 C.M.R. § 4.04 did not provide for consideration of open access, Cambridge contends that the Cable Division conducted unauthorized lawmaking (id.).

Cambridge notes that the Cable Division articulated the parameters for a license transfer review in Bay Shore Cable TV Assoc. v. Weymouth, Docket No. A-55 (1985) (id. at 20). Cambridge argues that it was not a party to that proceeding, and therefore it should not be bound by the decision (id. at 21). Cambridge asserts that Bay Shore does not bar consideration of public interest factors, as so ruled by the Cable Division (id.).

According to Cambridge, 207 C.M.R. § 4.06 allows the Cable Division broad discretion in ruling on appeals regarding license transfers (id. at 21). In addition, Cambridge argues that the Cable Division has discretion to waive the regulations. 207 C.M.R. § 2.04. Cambridge posits that this broad discretion should be a mechanism through which consideration of public interest factors beyond those outlined in 207 C.M.R. § 4.04 may be addressed (Cambridge Appeal at 21).

The Cable Division's Order diminishes local authorities' discretion to consider open access issues by applying the standards for a transfer review in Bay Shore (id.). Cambridge asserts, however, that Bay Shore did not articulate an absolute bar on public interest factors being considered in cases where a license transfer involves changes in services and service providers (id.). Therefore, according to Cambridge, Bay Shore, by itself, did not remove the discretion of local authorities to consider open access issues (id.).

Cambridge also argues that the Cable Division's application of 207 C.M.R. § 4.04 substantially impairs its contractual rights (id. at 23). Cambridge argues that the Cable Division's application of 207 C.M.R. § 4.04 violates the Contract Clause of the United States Constitution, because a contractual relationship "unquestionably exists" between Cambridge and MediaOne (id.). Cambridge argues that in its license agreement with MediaOne, the municipality reserved the ability to inquire "whether the proposed change of control and ownership is in the public interest" (id. at 24).

According to Cambridge, at the time the contract was executed, an issuing authority in Massachusetts was entitled to base its transfer decision on any concern as long as it was reasonable and not arbitrary (id.). Cambridge challenges the Cable Division's statement that the applicable standard at the time the license was granted was defined by the Bay Shore case, and had been articulated by the Cable Division as early as 1981 (id.). The only source of authority cited by the Cable Division, according to Cambridge, for such a continued policy, are two letters written by the General Counsel of the Cable Division in

1981 and 1983 (id.). Cambridge argues that it has never seen these letters and was never made aware of their contents; and, accordingly, they are insufficient to affect a reduction in Cambridge's discretion to address license transfers (id.).

Cambridge contends that 207 C.M.R. § 4.04 cannot be applied retroactively to the license agreement (id. at 25). According to Cambridge, its license agreement with MediaOne was executed before adoption of 207 C.M.R. § 4.04 (id.). In support of its assertion, Cambridge cites Massachusetts case law regarding general contractual law that states that the law in existence at the time an agreement is executed necessarily becomes part of the agreement, and amendments to the law after execution are not incorporated unless the contract unequivocally demonstrates the parties' intent to so incorporate (id. at 25-26, citing Feakes v. Bozyczko, 373 Mass. 633, 636 (1977); Salem v. Warner Amex Cable Communications, Inc. 392 Mass. 663 (1984)). According to Cambridge, the Bay Shore decision merely established the Cable Division's policy for a license transfer case before execution of the license has occurred, not law (id. at 26).

Cambridge contends that the appropriate standard of review for its denial of the license transfer should be that consent not be "arbitrarily or unreasonably withheld," noting that the Cable Division has found that this standard parallels the "arbitrary and capricious" standard of transfer decisions in other areas of the law (id. at 18, 19, citing Rollins Cablevision v. Somerset, Docket A-64 (1988)). Cambridge asserts that, due to the competitive implications of AT&T's closed access policy, Cambridge's requirement of an open access policy is not arbitrary and unreasonable, and therefore must be supported by the Commission (id. at 20).

Cambridge also seeks a reversal of the Cable Division's decision for policy reasons. The municipality argues that AT&T seeks to be a "gatekeeper" by determining the structure, quality and content of Internet access (id. at 9). Cambridge argues that without a commitment to open access, AT&T will be able to dictate which ISP people must use and will exclude competition from other ISPs (id. at 11). In addition, Cambridge argues that a narrow application of 207 C.M.R. § 4.04 does not allow for considering the "extensive and damaging effect upon competition raised by the transfer at hand," and a waiver of these regulations is necessary (id. at 28).

Cambridge states that the Cable Division's interpretation of G.L. c. 166A, § 7 has not been tested in a court of law (id. at 29). According to Cambridge, it intends to test the validity of the Cable Division's interpretation of this statute and the regulation promulgated thereunder (id.). For these reasons, Cambridge contends that the Commission must overturn the Cable Division's Order with regard to the issue of open access (id. at 1).

B. The Companies' Opposition

MediaOne and AT&T argue that Cambridge never had the authority to require open access in transfer licenses and that, therefore, the Cable Division did not reduce Cambridge's discretion (Opposition at 4). MediaOne and AT&T also assert that 207

C.M.R. § 4.04 does not impair contract rights because Cambridge's rights are limited to those expressly delegated to it by the legislature, and Cambridge has no inherent right to contract with cable television companies (id. at 9-10). According to MediaOne and AT&T, Cambridge has no federal right to consider open access issues during a license transfer proceeding (id. at 15). For these reasons, MediaOne and AT&T argue that a waiver of 207 C.M.R. § 4.04 is not justified, nor is an overruling of the Cable Division's decision on consideration of the open access issue by Cambridge (id. at 18, 22).

C. Standard of Review

General Law Chapter 166A, § 2 provides "any decision, order or ruling of the [Cable] Director" may be brought to the Commission of the Department. Unlike appeals from a Department Order pursuant to G.L. c. 25 § 5, which requires that the Department's decision be final, no requirement of finality for Cable Division decisions appears on the face of Section 2 as a predicate to appeal to the Commission. The different language in the two statutes gives rise to the inference that the Legislature may have intended that interlocutory Cable Division decisions be reviewable by the Commission on appeal.⁽⁵⁾ However, such an interpretation could lead to the Commission's having to rule on numerous consecutive appeals in the course of a single proceeding, compromising the efficiency of the agency. Some measure of Commission discretion in taking appeals of questions of substantive law inheres in the Section 2 wording "substantive" and "properly arising." Therefore, we find that the Commission's review of appeals of interlocutory decisions is subject to some measure of discretion. We exercise our discretion in taking up these appeals.

General Law Chapter 166A, § 2 is silent on the standard of review for an appeal of a Cable Division decision. One option for the Commission would be to conduct a de novo proceeding using the standard of review set forth in 207 C.M.R. § 4.04. The 14-day review period embodied in G.L. c. 166A, § 2 precludes a meaningful de novo review. Equally important, because the Cable Division conducted its transfer proceedings pursuant to the Massachusetts Administrative Procedure Act, all procedural protections have been afforded the parties. G.L. c. 166A, §§ 7, 14, 19; G.L. c. 30A, § 10. We determine here that in reviewing the appeals of the Cable Division's decision, we will not conduct a de novo review. This determination is consistent with Section 2's reference to "question[s] of substantive law," as presented in the instant appeal.

In determining the appropriate standard of review of Cable Division decisions, the Commission notes that the Federal Communications Commission ("FCC") has established a standard of reasonableness applicable to its review of Cable Division rate orders. See Harron Communications Corp., CSB-A-0622, at 1-2 (2000). We adopt the reasonableness standard used by the FCC for our purposes. Therefore, we will affirm the Cable Division's decision as long as there is a reasonable basis for the decision in federal law and in the Cable Division's own statute, regulations, and precedent.

D. Analysis And Finding

Cambridge contends that the Cable Division's regulations are invalid, or, that even if valid, the regulations are misapplied. As an initial matter, we note that this is not the proper forum in which to challenge the validity of an agency's regulations. Review of regulations may be had by a petition for declaratory relief in accordance with G.L. c. 30A, § 7, and c. 231A, § 2.⁽⁶⁾ Moreover, we may not challenge the constitutionality of the Cable Division's regulations. See Spence v. Boston Edison Company, 390 Mass. 604 (1983).

However, if we were to address Cambridge's arguments regarding the validity of the Cable Division's regulations, our analysis would be consistent with that of the Cable Division. As the Cable Division discussed, the statutory licensing scheme in Massachusetts allows municipalities to act as issuing authorities while the Cable Division retains ultimate authority over the licensing matters, including transfers. G.L. c. 166A, § 7, 14; Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission, 372 Mass. 495, 496 (1977); Waltham Telecommunications, et al. v. O'Brien, 403 Mass. 747, 749 (1989)). In this regard, we reject Cambridge's assertion that the Municipality is the sole franchising authority. As ultimate licensing authority, it is the responsibility of the Cable Division to determine what is "arbitrary and unreasonable" in the license transfer context. G.L. c. 166A, § 7, 14, 16; see Cleary v. Cardullo's Inc., 347 Mass. 337, 344 (1964); Care and Protection of Charles 406 Mass. 162, 173 (1989). The Cable Division fulfilled its responsibility by promulgating regulations, pursuant to G.L. c. 166A, §§ 2 and 16, that set objective criteria for assessing Section 7 claims that consent to license transfer has been "arbitrarily and unreasonably withheld." The purpose of transfer criteria is to ensure that the public interest is protected in that the level of service to community will not be degraded by transfer - not to serve as a means to prise concessions from the proposed transferee or assignee as a condition to taking over the licensed cable enterprise. Section 4.04 transfer criteria are a reasonable construction of G.L. c. 166A, §§ 2, 7, and 16.

Cambridge argues that § 4.04 interferes with its contractual rights in a manner that violates the Contracts Clause of the U.S. Constitution. We agree with the Cable Division's interpretation of G.L. c. 166A that the authority of municipal officials to negotiate license terms and award licenses is not absolute, but limited to the scope of the enabling statute and the regulations promulgated thereunder (Cable Division Order at 17, 19, citing New England Telephone and Telegraph Company v. City of Brockton, 332 Mass. 662, 664 (1955)).

Thus, we concur with the Cable Division's analysis regarding the validity of its regulations.

In applying its regulations to the matter before it, the Cable Division concluded that Cambridge acted beyond the scope of its authority and thus, arbitrarily and unreasonably, when it withheld approval of the Companies' transfer application (Cable Division Order at 34-35). The Cable Division defined the scope of Cambridge's authority based on the standard of review provided in the transfer regulations at 207 C.M.R. § 4.04. Under that standard, a municipality may consider the transferee's managerial experience, technical

ability, financial capacity, and legal capability to "step-in-the-shoes" of the transferor (Cable Division Order at 14-15, citing Bay Shore at 3; 207 C.M.R. § 4.04). In addition, a transferee must be able to fulfill the terms of the existing license; no amendments to the license may be required as part of the transfer process (id.).

Cambridge asserts that even if the regulatory transfer standard of review does not interfere with its contractual rights, the Cable Division's application of its regulations retroactively to licenses granted before the promulgation of subsection 4.04 impairs Cambridge's contractual rights. However, as the Cable Division found, the standard of review as codified in the regulations was previously articulated in Bay Shore (Cable Division Order at 19-20). The Cable Division issued Bay Shore before the Cambridge license was executed (id. at n.9). We concur with the Cable Division that Cambridge is subject to the standard articulated in Bay Shore. "It is a well-recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking." Arthurs v. Board of Registration in Medicine, 418 N.E. 2d 1236, 1246-47 (1980).

Based on our review of the pleadings, and the Cable Division's rationale included in its Order, we find that the Cable Division applied its regulations reasonably. We find the Cable Division acted reasonably in concluding that, inasmuch as the existing license agreement between Cambridge and MediaOne does not contain a provision requiring MediaOne to provide open access to unaffiliated ISPs, a requirement imposed by Cambridge to do so would constitute an amendment to the license. We further find that the Cable Division was reasonable in its application of § 4.04 when it held "efforts by issuing authorities to add to, enhance or otherwise modify existing franchise obligations in the pretext of requiring compliance with the four criteria of the transfer standard is prohibited . . . [Cambridge] may not allege failure to meet the legal and technical prongs of subsection 4.04(1) as grounds for denial when the grounds for denial also exceed the limits of subsection 4.04(2)" (Cable Division Order at 33).

Finally, in its appeal, Cambridge argues that the transfer regulations should not be applied here, essentially renewing its request for a waiver of the regulations under 207 C.M.R. § 2.04. According to Cambridge, the circumstances and issues involved in this license transfer are so unlike other license transfers that a waiver of 207 C.M.R. § 4.04 is warranted. Since Cambridge presented the same argument in its waiver request to the cable Division, we will overturn the Cable Division's decision only if it was an unreasonable construction of its authority. In reviewing the Cable Division's rationale for rejecting the waiver request, we find that the Cable Division reasonably accounted for basic principles of fairness and administrative law, and reasonably defined the protective purposes of Chapter 166A. The standard of review is well-established and has been applied to all transfer applications for over 15 years (Cable Division Order at 28).⁽⁷⁾

Before such a standard may be changed, interested persons must be afforded notice and the opportunity to comment. G.L. c. 30A. Moreover, we note that review and consideration of the important public policy issues concerning open access to which Cambridge refers, and which the Cable Division recognized, are not foreclosed to issuing

authorities, as these issues may be considered in other licensing proceedings. Accordingly, we find that the Cable Division was right in determining that the public interest is served by application of the current standard of review in this matter.

For reasons stated in the Order, we concur with the Cable Division's decisions that there are no genuine issues of material fact and the Companies are entitled to a decision in their favor as a matter of law.

V. MEDIAONE AND AT&T'S APPEAL

- Summary of Argument

The Companies appeal the Cable Division's denial of their Motion for Summary Decision. In support of their appeal, the Companies argue that no genuine issues of material fact exist with respect to the management experience of AT&T to operate the cable television system, and therefore summary decision was appropriate (MediaOne Appeal, Att.1, at 1).

The Companies also explain that "the purpose of this appeal is to preserve the Appellants' right to judicial review of the Order's denial of the Appellants' request for Summary Decision with respect to the denial by the City Manager of the City of Cambridge . . . of transfer consent" (*id.* at 1). The Companies go on to note that they plan to cooperate fully in the expedited review of the remaining issues in this proceeding (*id.*).

The Companies contend that AT&T's management experience derives from MediaOne's management and operating personnel that will be retained to manage and operate the Cambridge system, the experience derived from ownership of Tele-Communications, Inc. ("TCI"), and AT&T's own management experience (*id.*).

According to the Companies, Cambridge's basis for rejecting the license transfers, AT&T's lack of "direct" managerial experience, is arbitrary and unreasonable and should be rejected summarily as a matter of law (*id.*, Att. 1, at 1). The Companies assert that this "direct" experience standard would render all cable television companies organized under a holding company structure disqualified from receiving a license transfer (*id.*). The City's finding that AT&T lacks managerial experience under this standard according to MediaOne and AT&T, is inconsistent with the conclusion of over 170 franchising authorities in Massachusetts which approved the license transfers, and is inconsistent with the conclusions of 1400 TCI cable communities nationwide (*id.* at 2).

The Companies also appeal the Cable Division's decision to deny the Companies' Motion for Summary Decision of Cambridge's denial on the basis of alleged license compliance issues with MediaOne. The Companies argue that they demonstrated to the Cable Division that there were no material issues of fact with respect to Cambridge's denial. The Companies assert that license compliance issues are outside the scope of the transfer criteria, and more relevant to the license renewal process.

B. Analysis and Findings

The Companies frame their argument solely as a matter of law, arguing that Cambridge applied an improper legal standard, that is, a "direct" management experience standard, in reviewing their license transfer application. In denying the Companies' motion, the Cable Division found that because the City disputed the Companies' claim that they presented adequate evidence of their management expertise, and argued that Cambridge did not receive adequate assurances in the transfer hearings, issues of material fact were in dispute (Cable Division Order at 37). Although the dispute over the "direct" managerial standard may involve a matter of law, the Cable Division reasonably denied summary decision because questions of fact regarding AT&T's management experience exist, regardless of whether they are ultimately reviewed under a "direct" or lesser management standard. For example, to the extent that Cambridge asserts that AT&T lacks direct experience to manage cable television systems, the Cable Division must determine if Cambridge's rejection of AT&T's other management experience is reasonable. In addition, the Cable Division stated that it will inquire into Cambridge's concerns about AT&T's future plans for retaining or releasing current management personnel. Thus, we agree that there are disputed issues of fact regarding the sufficiency -- or insufficiency -- of AT&T's management experience to operate a cable system under the existing licenses. Accordingly, the Cable Division was reasonable in denying summary decision in the face of a factual dispute.

With respect to the license compliance issues, the Cable Division found that it did not have enough information to determine the relevance of Cambridge's grounds for denial (Cable Division Order at 38). The Cable Division therefore did not find that the Companies were not entitled to summary decision as a matter of law, but that the record lacked sufficient information to determine whether any material factual issues existed. Similarly, we are unable to make such a determination based on the record before us.⁽⁸⁾ Therefore, the Cable Division reasonably denied summary decision where further proceedings would assist in making a determination on that point. Accordingly, the appeal of MediaOne/AT&T is denied on both the management and the future adherence to license terms issues.

VI. ORDER

Accordingly, after due consideration, it is

ORDERED: City of Cambridge's Appeal is hereby DENIED; and it is

FURTHER ORDERED: MediaOne of Massachusetts, Inc.'s, MediaOne Group, Inc.'s and AT&T Corp.'s Appeal of CTV-99-4 is hereby DENIED.

By Order of the Commission,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

1. As the Cable Division noted, there is no settled definition of "open access," or even common usage of the term, as the Companies also use the terms "equal access" or "forced access" (Cable Division Order at 3, n.2). Generally, the issue involves mandatory, non-discriminatory access to a cable operator's cable modem platform for unaffiliated providers of Internet and on-line services. For consistency alone, we refer to the issue as "open access."

2. A transaction through which a person (or other entity), a family group, or a group of persons (or entities) acting in concert, gains or loses control of a license or licensee shall constitute a transfer or assignment of a license or control thereof under G.L. c. 166A, § 7. 207 C.M.R. § 4.01(1).

3. On this date, MediaOne of Ohio, Inc., MediaOne Group, Inc., and AT&T Corp. also filed an appeal of the Cable Division's decision on management experience and license compliance issues with regard to the City of Somerville. That matter was docketed as D.T.E. 00-51. On May 26, 2000, the appeal was withdrawn pursuant to settlement.

4. The Companies also filed appeals from the conditional approvals of the Town of North Andover and City of Quincy. Those appeals were resolved in the Cable Division Order and are not at issue here.

5. The Cable Division's full integration into the Department in 2002 (St. 1997, c. 164, § 344) may require a second look at the standard of review set out here today.

6. The procedure [for declaratory judgments] . . . may be used to secure determinations of . . . administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination. Said procedure . . . may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any . . . state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws" G.L. 231A, § 2.

7. With respect to Cambridge's argument that the Cable Division improperly relied on an advisory rulings from a former General Counsel in supporting the continuity of its standard of review, the advisory rulings are official statements of policy and are public records, available for inspection at the Cable Division's offices. Moreover, the Bay Shore

decision, which was issued before the execution of Cambridge's license, clearly sets out the Cable Division's policy.

8. The Companies seem to acknowledge as much in their statement that their appeal was filed to preserve their rights to judicial review.